



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)
(petitioner's address)

DECISION

MDV-44/45418

PRELIMINARY RECITALS

Pursuant to a oral petition made via telephone to Outagamie County Health and Human Services (County) on May 11, 2000, under Wis. Stat. § 49.45(5) (1997-98), to review a decision by the County in regard to Medical Assistance (MA), a hearing was held on August 21, 2000 in Appleton, Wisconsin. At petitioner's request the record was held open until September 18, 2000.

The issue for determination is whether, under the law governing MA, petitioner divested certain assets.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[petitioner (not present at August 21,
2000 hearing)]

Represented by:

[petitioner's son and Power of Attorney
(POA)]

Wisconsin Department of Health and Family Services
P.O. Box 7850
Madison, Wisconsin 53707-7850

BY: Evy Deininger, ESS II
Outagamie County Health and Human Services
Economic Support Division
Human Services Building
Level 2
401 South Elm Street
Appleton, Wisconsin 54911-5985

HEARING OFFICER:

Sean P. Maloney
Administrative Law Judge
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx; DOB xx/xx/xxxx) is a resident of Outagamie County, Wisconsin.
2. Prior to October 29, 1999 petitioner owned a house in Little Chute, Wisconsin (Little Chute house). Exhibit #7.
3. On September 24, 1999, after petitioner's relatives had spent many hours cleaning and repairing the Little Chute house, it was appraised for \$55,000.00. Exhibit #7.
4. On October 29, 1999 petitioner sold the Little Chute house to his granddaughter for \$50,000.00. Exhibit #7.
5. Out of the \$50,000.00 proceeds from the sale of the Little Chute house petitioner made the following money gifts in the total amount of \$18,037.41:
 - (a) \$6,000.00 on October 29, 1999 to his son;
 - (b) \$6,000.00 on November 12, 1999 to his youngest daughter; and
 - (c) \$6,037.41 to another of his daughters (\$4,500.00 on November 12, 1999; \$493.34 on November 14, 1999; \$75.26 on November 14, 1999; \$123.21 on November 14, 1999; \$495.60 on November 14, 1999; and, \$350.00 on November 26, 1999).TOTAL: \$18,037.41.
Exhibits #3, #4, #5 #6 & #8.
6. Petitioner applied for MA nursing home coverage and by a manual "Negative Notice" dated May 10, 2000 the County notified petitioner that he was not eligible for MA nursing home coverage for March 2000 and April 2000 due to divestment of assets. Exhibit #1.
7. On May 11, 2000 petitioner made an oral request via telephone to the County for a hearing concerning the May 10, 2000 manual "Negative Notice".

DISCUSSION

(I) TIMELINESS OF HEARING REQUEST

As a threshold matter the County argues that petitioner's petition must be dismissed because it was not made in a timely manner.

DHA can only hear cases on the merits if there is jurisdiction to do so. There is no jurisdiction if an appeal is untimely. An appeal concerning MA is untimely if it is not received by DHA within 45 days of the date of the action being appealed. See, 42 C.F.R. § 431.221(d) (1999); Wis. Stat. § 49.45(5) (1997-98); Wis. Admin. Code § HFS 104.01(5)(a)3. (April 1999); Income Maintenance Manual, II-G-3.4.0.

In this case, the action being appealed occurred May 10, 2000 when the manual Negative Notice was issued. It is true that petitioner's written request for a Fair Hearing was not received by the Division of Hearings

and Appeals (DHA) until July 21, 2000. However, a request for a hearing need not be in writing and need not be made to DHA.

“A request for a hearing may be made in writing or orally and may be made to the [county] agency or the [DHA]. An oral request to the [county] agency shall be reduced to writing by the [county] agency and signed by the petitioner . . . “ Wis. Admin. Code §§ HA 3.03(2) & (6) and 3.05(2)(a) (November 1999).

“A hearing request shall be considered filed on the date of actual receipt by the [DHA] or [County] agency . . . “ Wis. Admin. Code § HA 3.05(3)(c) (November 1999).

In this case, it is undisputed that on May 11, 2000 the County received an oral request via telephone from petitioner for a hearing. This is well within the allowed 45-days. The fact that the County failed to reduce petitioner’s request to writing and have petitioner sign it does not make petitioner’s request untimely.

(II) DIVESTMENT

With certain exceptions not applicable here, if an institutionalized individual, or another person acting on behalf of the institutionalized individual, transfers assets for less than Fair Market Value (FMV) on or after the institutionalized individual's look-back date (commonly known as “divestment”), the institutionalized individual is ineligible for nursing facility services under MA for a specified time period. 42 U.S.C. § 1396p(c)(1)(A) (Supp. 2000); Wis. Stat. § 49.453(2)(a)1. (1997-98); Wis. Admin. Code § HFS 103.065(4)(a) (March 2000); MA Handbook, Appendix 14.1.0, 14.2.1, 14.2.2 & 14.5.0.

For an institutionalized individual the “look-back date” is at least thirty-six months before the first date on which the individual is both an institutionalized individual and has applied for MA. 42 U.S.C. § 1396p(c)(1)(B) (Supp. 2000); Wis. Stat. § 49.453(1)(f)1. (1997-98); MA Handbook, Appendix 14.3.0.; See also, Wis. Admin. Code § HFS 103.065(4)(a) (March 2000).

(A) Little Chute House

The FMV of the Little Chute house at the time of its sale on October 29, 1999 was \$55,000.00 and it was sold for \$50,000.00. Petitioner does not dispute this. Petitioner acknowledges that, after clean-up and repairs, the Little Chute house had a value of \$55,000.00. Thus, the Little Chute house was sold to petitioner’s granddaughter for \$5,000.00 less than FMV. This is a divestment of \$5,000.00 by petitioner.

The sale of the Little Chute house was handled by petitioner’s Power of Attorney (POA), his son. Petitioner’s POA argues that in 1975 petitioner’s wife, with whom petitioner lived in the Little Chute house, died and that thereafter petitioner continued to live in the Little Chute house by himself and did not clean the house or do necessary repairs. Furthermore: petitioner smoked and the windows of the Little Chute house were sealed with plastic and never opened; petitioner did not have complete control of his bowels and often was not on the toilet when he had a bowel movement, as a result the Little Chute house had human fecal matter in the living areas with a “trail” leading to the bathroom and the house stank; the Little Chute house had mechanical problems that had developed since 1975 and had not been tended to; the Little Chute house needed a new furnace.

Petitioner's POA argues that petitioner's relatives spent many hours cleaning and repairing the Little Chute house and had several large dumpsters of debris hauled away. He argues that prior to any clean-up or repair being done the Little Chute house was appraised for \$48,000.00.

The increase in the appraised FMV of the Little Chute house from \$48,000.00 to \$55,000.00 was no doubt due largely, if not solely, to the clean-up and repairs done by petitioner's relatives. In effect, petitioner's relatives made a gift to petitioner of their time and labor spent cleaning and repairing the Little Chute house. The strong feelings of petitioner's POA and of petitioner's other relatives concerning this is understandable. However, this does not change the fact that petitioner divested assets by selling the Little Chute house to his granddaughter for \$5,000.00 less than its \$55,000.000 FMV.

(B) Money Gifts

Petitioner does not deny that he made a total of \$18,037.41 in money gifts to his relatives. Petitioner's POA explains that the money gifts were made after consulting an attorney and being assured that "\$18,000.00 was available to be gifted from your dad to the children." The attorney stated "[t]here is nothing improper or illegal about the process we are undertaking. If your dad's assets are under \$2,000.00 in March, 2000, he will be eligible for Medical Assistance." Exhibit #8.

The \$18,037.41 in money gifted by petitioner is clearly a divestment. The fact that petitioner may have been given incorrect advice by an attorney does not change this.

Finally, the County maintains that, in addition to the \$18,037.41, petitioner also gifted \$6,000.00 in money to his daughter-in-law. The evidence in the record of this matter does not support this. The \$6,000.00 passed to his daughter-in-law was merely part of the \$6,037.41 that petitioner gifted to his daughter. It was not an additional \$6,000.00 gift.

CONCLUSIONS OF LAW

For the reasons explained above, petitioner divested assets in the total amount of \$23,037.41 (\$5,000.00 Little Chute house divestment plus \$18,037.41 money gift divestments).

NOW, THEREFORE, it is

ORDERED

That this matter be remanded to the County and that, within 10 days of the date of this Decision, the County recalculate petitioner's divestment penalty period using a total divestment of \$23,037.41 and issue any additional MA benefits to which petitioner is otherwise entitled. In all other respects it is ordered that the petition for review herein be and the same is hereby dismissed.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning Medical Assistance (MA) must be served on the Wisconsin Department of Health and Family Services, P.O. Box 7850, Madison, WI 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of
Madison, Wisconsin, this _____ day
of _____, 2001.

Sean P. Maloney
Administrative Law Judge
Division of Hearings and Appeals
10062000/SPM

xc:

Outagamie County Health and Human Services